Supreme Court, U.S.
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No. 97-204

In The

Supreme Court of the United States

October Term, 1996

KEENA WHITE, by her Personal Representative, CINDY WHITE, CINDY WHITE, Individually, and CINDY WHITE, as Guardian ad Litem for DEIDRE JONES, CLIFFORD WHITE, JR., PATRIC WHITE, DANIEL WHITE and DARREN WHITE,

Petitioners,

vs.

RUBY CHAMBLISS; TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; CASSIE WILSON; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; DESIREE COUNCIL,

Respondents,

-and-

ANTHONY BONNER, GLADYS BONNER and TONY BONNER,

Defendants.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the Fourth Circuit correctly conclude, in light of controlling Fourth Circuit precedent and the lack of Supreme Court authority, that no clearly established right to affirmative state protection exists for children placed in foster care?

II. Did the Fourth Circuit correctly conclude that the Adoption Assistance and Child Welfare Act of 1980 could not form the basis of petitioners' 42 U.S.C. § 1983 claim?

III. Did the Fourth Circuit correctly conclude that the South Carolina Child Protection Act does not create federal constitutional guarantees?

LIST OF ALL PARTIES

Petitioners' list of parties is correct with the exception of the spelling of Ruby Chambliss.

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OPINIONS BELOW

The Fourth Circuit's decision in *White v. Chambliss* is reported at 112 F.3d 731 (4th Cir. 1997), and is set forth in the Appendix filed by the petitioners at 1a. The Fourth Circuit's denial of the Petition for Rehearing with Suggestion for Rehearing In Banc is set forth in the Appendix at 19a. Finally, the district court's written order from which the respondents appealed is set forth in the Appendix at 16a.

FEDERAL STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners identify the Fourteenth Amendment to the Constitution and 42 U.S.C. § 1983, which are set forth in the Appendix at 22a. Petitioners identify "42 U.S.C. § 671, *et seq.*" as a federal statute involved, but the Appendix only sets forth §§ 671 and 672, which are the only provisions relied upon in the petition. Petitioners also identify 42 U.S.C. § 1320a-2, which is not set forth in the Appendix, and therefore, is set forth below:

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not

> intended to alter the holding in Suter v. Artist M. that section 671(a)(15) of this title is not enforceable in a private right of action.

Finally, petitioners set forth "§ 627" in the Appendix, but do not identify it in the petition as a federal statute involved in the case.

STATEMENT OF THE CASE

This action arose out of the alleged wrongful death of Keena White, a minor child, while she was in foster care. The petitioners, who were plaintiffs/appellees below, are Cindy White and her living children. The Respondents, who were defendants/appellants below, are various employees of the South Carolina Department of Social Services ("DSS").

The petitioners' Brief Summary of the Facts, Detailed Factual Summary, and Argument contain numerous misstatements of fact in that there is either no support for such misstatements in the record below, or the facts as alleged by the petitioners were not discovered until 1993, many months *after* the death of Keena White, which occurred in January, 1992.[1] A correct statement of facts, supported by the record below, follows:

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1. Petitioners make the following misstatements: that DSS failed to properly license, train, or monitor the foster homes, petition at 2 & throughout; that the Sheriff's Department refused to remove the White children, *id.* at 2-3; that DSS failed to supervise their placements and visit the homes, *id.* at 3; that DSS abandoned six helpless children, *id.*; that Keena had untreated illnesses and injuries while in foster care, *id.*; that the Bonner foster home was not properly licensed and was abusive, *id.* at 3-4; that all White children were abused in their respective foster homes, *id.* at 4; that Ms. White reported abuse of her children to four caseworkers on three occasions, *id.*; that State Senator Moore asked Carol Heyes to speak to caseworkers regarding the White children's alleged abuse in foster care, *id.* at 5; that government studies

(Cont'd)

On November 20, 1991, shortly before midnight, Ms. White took her son, Daniel, to the University Hospital in Augusta, Georgia with a broken arm. After examining Daniel, the physicians diagnosed his condition as a fractured "spiral" humerus of the left arm. As a result, the physicians suspected child abuse because a spiral fracture is a very strong indicator of child abuse. The hospital staff then contacted the Aiken County Sheriff's Department which in turn relayed the information to the Aiken County office of DSS. A nurse at the hospital contacted Tanga Gilchrist, an Aiken County DSS caseworker, and reported to her that they had a child who they suspected was a victim of abuse.

After receiving the telephone call, Ms. Gilchrist proceeded to the University Hospital to investigate the situation and make a report. When questioned as to how the injury occurred, Ms. White could offer no believable or even plausible explanation. Although Ms. White claimed she was not in the room when Daniel broke his arm, she speculated he might have fallen out of his bed and caught his arm in the bed slats. Investigating further, Ms. Gilchrist learned from the treating physician that it was "very unlikely" such a spiral fracture could have been sustained from a fall or falling out of a bed. The doctor opined that the child needed to be in the custody of DSS and agreed to hold the child until DSS could take action. Ms. Gilchrist also

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(Cont'd)

revealed long-standing deficiencies in foster care, *id.*; that the DSS defendants admit the White children were in state custody, *id.* at 13-14; that the DSS defendants placed Keena in a dangerous, unsupervised foster home, *id.* at 16; that the DSS defendants knew of willful violations of state law and procedure prior to Keena's death, *id.* at 16-17; that the DSS defendants failed to visit and provide medical care to the White children while in foster care, *id.* at 17; that the DSS defendants knew of violations of state law, policy, or procedure involving the Bonner foster home prior to Keena's death, *id.* at 19; and that DSS or the DSS defendants knew its policies were causing children to die in foster care, *id.* at 20.

consulted with another physician, an orthopedist, who confirmed the opinions given by the first doctor.

On November 22, 1991, Ms. Gilchrist went to Ms. White's home in order to personally view and examine the bed from which Daniel had supposedly fallen. Ms. Gilchrist personally tested the theory that Daniel could possibly have gotten his arm caught between the slats in the bed or fallen out of the bed and concluded that Ms. White's theory was unbelievable because Ms. Gilchrist has a larger arm than Daniel and her arm did not get caught between the slats. Ms. Gilchrist also noted that the bed was less than one foot from the floor. That same day, Ms. Gilchrist and her supervisor, Ruby Chambliss, determined that an *ex parte* petition for custody of Ms. White's children should be submitted to the Family Court for Aiken County.

On November 26, 1991, DSS filed the petition for emergency protective custody and the petition for removal in Aiken County Family Court. The judge signed the *ex parte* order granting emergency protective custody to Aiken County DSS on November 26, 1991, and DSS received the order on December 3, 1991. The court order stated that probable cause existed to believe that, by reason of abuse and/or neglect, there is a threat to the life and physical safety of Daniel, Darren, Deidre, Clifford, Patric, and Keena, who were in the custody of Ms. White, and that DSS should have temporary custody. The same day DSS received the order, Ms. Gilchrist and another caseworker accompanied Aiken County Sheriff's Department personnel to Ms. White's trailer and took custody of her children as directed by the court order. When they arrived, the children had soiled diapers, wore dirty clothes, smelled terrible, and the house was filthy dirty and smelled of feces.

A probable cause hearing was held the day after the removal, which Ms. White attended, and the court found probable cause

existed for the minor children to be taken into emergency protective custody which had been effected on December 3, 1991. The court further concluded that it would be contrary to the best interests of the minor children to return them to Ms. White in view of the *prima facie* evidence of physical abuse to Daniel White. The court ruled that custody of all children should remain with DSS pending a merits hearing, but allowed Ms. White supervised visitation with her children in the meantime. The White children were placed in various foster homes, with Keena going to the home of Anthony and Gladys Bonner, whose foster home had previously been licensed.

During the weeks between the December 4 probable cause hearing and the scheduled merits hearing, Ms. White was allowed supervised visitation with her children. Ms. White alleged that during these visits, she noticed bruises and scratches on her children and that she relayed her concerns to a DSS caseworker. Ms. White subsequently wrote a letter to Senator Strom Thurmond seeking return of her children and expressing her concerns regarding the alleged bruises and scratches. Senator Thurmond wrote DSS on December 20 on Ms. White's behalf. Cassie Wilson, who was director of Human Services at Aiken County DSS, testified that Ms. White told her the children routinely sustained injuries from normal play activity and fighting. Ms. Wilson further testified that when the children were removed from Ms. White's home, they had various bruises, scratches, and other injuries on them. Tina Werts, who was Aiken County DSS' foster care worker, testified that she took Keena White to the doctor for a cold around January 3, 1992, and that Keena was in good condition on that day. Thus, DSS concluded that the children's injuries were either present when the children were taken into custody or were sustained during normal child play.

On January 18, 1992, approximately six (6) weeks after being placed with the Bonners, Keena died, apparently of blows

to the head, while in the Bonners' care. The forensic pathologist stated that her death was "best classified as a homicide." Because law enforcement officials were unable to determine who struck Keena, no criminal charges were filed. DSS removed all foster children from the Bonners' home and placed no other children in their home after Keena's death. Following an investigation into Keena's death, DSS revoked the Bonners' foster care license.

At the merits hearing on January 24, 1992, counsel for the respective parties submitted a settlement agreement in which Ms. White acknowledged that Daniel White had been physically abused by an "unknown" perpetrator when he received the spiral fracture at his home. DSS returned both legal and physical custody of the minor children to Ms. White on the condition that she receive a psychological evaluation, including observation of the family unit, at the expense of DSS. Ms. White also agreed to several other specified conditions with which she was to comply and DSS was to monitor. Ms. White freely and voluntarily entered into the agreement outlined in the order mentioned above, agreed it was fair and equitable and in the best interests of the minor children, and asked that it be approved and made the order of the court.

Ms. White filed suit on November 18, 1993, as personal representative of the estate of Keena for her alleged wrongful death, pain and suffering, and for alleged violations of Keena's due process rights. Ms. White also sued as guardian *ad litem* for her other five (5) children for alleged violations of both their due process rights and her own due process rights. Ms. White named the respondents as defendants in the suit along with the Bonners. The respondents are referred to collectively as "the DSS defendants" throughout the brief.

After extensive discovery, the respondents filed motions for summary judgment based, in part, on the grounds of qualified

immunity. The district court denied the motions, and the DSS defendants appealed. On appeal, the United States Court of Appeals for the Fourth Circuit reversed the district court, finding that the DSS defendants were entitled to qualified immunity.

REASONS FOR DENYING THE WRIT

I.

DID THE FOURTH CIRCUIT CORRECTLY CONCLUDE, IN LIGHT OF CONTROLLING FOURTH CIRCUIT PRECEDENT AND THE LACK OF SUPREME COURT AUTHORITY, THAT NO CLEARLY ESTABLISHED RIGHT TO AFFIRMATIVE STATE PROTECTION EXISTS FOR CHILDREN PLACED IN FOSTER CARE?

A. Did The Fourth Circuit Correctly Conclude That No Affirmative Duty Of Protection Was "Clearly Established" At The Time Of The Events In Question?

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). According to Fourth Circuit precedent, a right is not clearly established unless the right has been recognized by the highest court in the state where the case arose, by the appropriate United States Court of Appeals, or by the Supreme Court. *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980), *cert. denied*, 451 U.S. 969 (1981).

Further, "[t]he contours of the right [allegedly violated] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). This qualified immunity from suit under § 1983 protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In 1989, more than two years prior to the events giving rise to the present case, binding Fourth Circuit precedent clearly established that state officials owe no duty to protect children in foster care. *Milburn v. Anne Arundel County Dep't of Social Serv.*, 871 F.2d 474 (4th Cir.), *cert. denied*, 493 U.S. 850 (1989). Therefore, the plaintiffs could hardly argue that the DSS defendants violated a clearly established affirmative duty to protect the children while they were in foster care because the law specifically provided to the contrary. In *Milburn*, the Fourth Circuit held that foster parents are not state actors for purposes of § 1983. The court reasoned that the state is not responsible for the alleged abuse; it exercised no coercive power over the foster parents; it did not encourage them; and the care of foster children is not traditionally the exclusive prerogative of the state. The court concluded that the unfortunate abuse at the hands of the foster parents did not make the foster parents state actors, and it did not make those who might have intervened liable under § 1983. *Id.* at 479, *cited with approval in*, *United Auto Workers v. Gaston Festivals, Inc.*, 43 F.3d 902, 907 (4th Cir. 1995) (" 'care of foster children' not considered traditionally and exclusively a governmental function"); *Andrews v. Federal Home Loan Bank*, 998 F.2d 214, 220 (4th Cir. 1993) ("child abuse by foster parents not state action when state failed to intervene to protect child"); *Weller v. Department of Social Serv.*, 901 F.2d 387, 392 (4th Cir. 1990) ("We recently held that harm suffered by a child at the hands of his foster parents is not harm inflicted by state

agents.").[2] Additionally, the South Carolina Supreme Court held in 1991 that foster parents are mere licensees, and not employees or even independent contractors for DSS. *Simmons v. Robinson*, 409 S.E. 2d 381, 383 (S. C. 1991).

In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), this Court held that the state and its officials do not owe children an affirmative duty of protection against private violence. Even though the state was aware of the suspected abuse and undertook to protect the child in *DeShaney*, the state did not have an affirmative constitutional duty to provide protection because the child was not in state custody, and the harm was not inflicted by a state actor. *DeShaney*, 489 U.S. at 201. Although this Court in *DeShaney* specifically left open the question of whether foster care constitutes the type of custodial relationship which gives rise to an affirmative duty of protection,[3] *id.* at 201 n.9, the Fourth Circuit subsequently decided the issue in *Milburn*. Applying *DeShaney*, the Fourth Circuit concluded that because foster care is not state custody and foster parents are not state actors, children placed in foster care have no federal constitutional right to protection by the state.

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2. As the Fourth Circuit noted below, petitioners' claim that the method of placement in foster care distinguished *Milburn* from the present cases is misguided. The Fourth Circuit did not discuss the nature of the placement as part of its reasoning in *Milburn*. Further, the foster parents in *Milburn* had a contract with the state in which the state was obligated to license the foster home; supervise placement of the child in the home; and provide board, medical care, clothing and supervision of the child during placement. The state shoulders the same responsibilities (*i.e.*, licensing, supervision, basic necessities, etc.) regardless of how the child came to be placed in foster care. "Nothing in *Milburn* limited its application to situations where parents had voluntarily placed their children in foster care, and *Milburn* was not interpreted as being so limited in subsequent Fourth Circuit cases." Appendix at 12a.

3. Petitioners' statement that "*DeShaney* recognized foster care as state custody," petition at 10, clearly misstates this Court's holding in *DeShaney*.

When the events giving rise to the instant case began in late 1991, the Fourth Circuit had squarely held that the state owes no affirmative duty to protect children in foster care. Therefore, the Fourth Circuit properly concluded that the DSS defendants were entitled to qualified immunity because no "right to affirmative state protection for children placed in foster care was clearly established at the time of Keena's death." Appendix at 12a. Even if this Court were to conclude that foster parents are state actors, the DSS defendants would still be entitled to qualified immunity because the issue was not clearly established at the time of these events.

B. Did The Fourth Circuit Correctly Conclude That Foster Parents Are Not State Actors?

Petitioners seeks to hold the DSS defendants liable under 42 U.S.C. § 1983 for the harm suffered by Keena White while under the Bonners' care. In order for petitioners to show that the alleged constitutional deprivation was under color of state law as required by § 1983, petitioners must prove the existence of state action. *United States v. Price*, 383 U.S. 787, 794 n.7 (1966). In determining whether a private party falls within the scope of § 1983 as a state actor, the plaintiff must demonstrate the following three factors: (1) that a sufficiently close nexus exists between the state and the challenged action in order that the action of the actor might fairly be treated as that of the state, and regulation alone is not enough; (2) that the state has exercised coercive power or such significant encouragement that the actor's choice must be deemed that of the state; and (3) that "the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.' " *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)).

In determining whether the foster parents are state actors and whether foster care is state custody, the Fourth Circuit in

Milburn reviewed and applied this Court's decisions in *Jackson*, *Blum*, and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). In *Jackson*, this Court held that a utility company was not a state actor for purposes of § 1983 despite the extensive and detailed regulation of the company by the state. *Jackson*, 419 U.S. at 350, 358. In *Blum*, this Court held that state action is not present when nursing homes decide to discharge or transfer Medicaid patients even though the state subsidized the cost of the nursing homes, the state paid more than 90% of the patients' medical expenses in the homes, and the state licensed the homes. *Blum*, 457 U.S. at 1011-12. In *Rendell-Baker*, this Court held that a private school, which derived most of its income from the state and was regulated by the state, was not a state actor. *Rendell-Baker*, 457 U.S. at 839-43.

Applying this Court's precedent, the Fourth Circuit correctly concluded in *Milburn* that foster care is not state custody, and foster parents are not state actors. The Fourth Circuit reasoned that the state is not responsible for the alleged abuse; it exercised no coercive power over the foster parents; it did not encourage them; and the care of foster children is not traditionally the exclusive prerogative of the state. The court concluded that the unfortunate abuse at the hands of the foster parents did not make the foster parents state actors, and it did not make those who might have intervened liable under § 1983. *Milburn*, 871 F.2d at 479. Just as in *Jackson* and *Rendell-Baker*, the regulation of foster homes by the state does not render the foster parents state actors. Further, just as in *Blum*, the subsidy and licensing provided to the foster parents by the state does not render the foster parents state actors.

> The functions considered to fall traditionally within the exclusive prerogative of the state comprise a very narrow category, subject to "carefully confined bounds." The

Supreme Court has identified as functions "traditionally exclusively reserved to the State," only the administration of elections, the operation of a company town, eminent domain, peremptory challenges in jury selection, and, in at least limited circumstances, the operation of a municipal park.

The narrowness of this category is illustrated further by the functions that the Court has held do *not* fall traditionally within the exclusive prerogative of the state. These include the provision of electricity and other utilities, the operation of nursing homes, and the coordination and governance of college and amateur athletics. The Court has held that schooling for maladjusted children does not qualify as a traditional and exclusive state function. It has also noted that the provision of education does not render a private school's administrators state actors, even though "[i]t is difficult to imagine a regulated activity more essential or more 'clothed with the public interest' than the maintenance of schools." *See also Milburn v. Anne Arundel County Dep't of Social Servs.*, 871 F.2d 474, 479 (4th Cir.), *cert. denied*, 493 U.S. 850, 110 S. Ct. 148, 107 L.Ed.2d 106 (1989) ("care of foster children" not considered traditionally and exclusively a governmental function.)

Together these cases confirm that only those undertakings that are uniquely

> sovereign in character qualify as traditional and exclusive state functions. As the Court has observed, "[w]hile many functions have been traditionally preformed by governments, very few have been 'exclusively reserved to the State.' "

United Auto Workers, 43 F.3d at 907 (citations omitted).

Constitutional standards are invoked only when the state is *responsible* for the specific conduct of which the plaintiffs complain, *Milburn*, 871 F.2d at 478, and in the present case, the Bonners, not the state, are responsible for any alleged abuse. As properly noted by the Fourth Circuit below, the record contains no evidence that the DSS defendants knew or suspected that the Bonners were abusive foster parents, or that the Bonners had ever been accused of or investigated for child abuse. Appendix at 10a. Further, the Bonners were licensed foster care workers. *Id.* Thus, the DSS defendants are not responsible for the unfortunate abuse Keena suffered while under the Bonners' care which they could not have known would occur.[4]

Petitioners rely upon *West v. Atkins*, 487 U.S. 42 (1988), as support for their contention that foster parents are state actors. In *West*, this Court held that a physician who provided medical services to a prisoner at the state's request was a state actor for purposes of § 1983. *West* is distinguishable from the present case because this Court's reasoning in *West* stemmed from the state's affirmative duty to provide medical care to prisoners as

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4. Petitioners' quote from this Court's decision in *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977), sheds no light on whether foster parents are state actors and whether foster care is state custody. In *Smith*, this Court examined foster care in determining whether foster parents enjoy procedural due process rights to notice and a hearing prior to removal of the foster child.

recognized in *Estelle v. Gamble*, 429 U.S. 97 (1976). All medical services provided to prisoners are quite obviously state action under § 1983 because incarceration is the *exclusive* prerogative of the state, one of the required elements for finding state action under *Blum* and *Jackson*. To the contrary, no such affirmative duty exists in the foster care context; and therefore, the basis for finding state action in *West* is lacking in foster care.

Petitioners also erroneously rely upon *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), in which this Court held that state action exists when a restaurant that leases public property from the state racially discriminates in violation of the Fourteenth Amendment. *Burton* has no bearing on the present case because this Court explicitly limited the holding to cases in which the actor leases public property from the state and fails to comply with the proscriptions of the Fourteenth Amendment. *Burton*, 365 U.S. at 726.

Finally, petitioners erroneously refuse to acknowledge the application of *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) to the present case. In *Moose Lodge No. 107*, this Court held that racial discrimination of a private club does not constitute state action merely because the club receives a liquor license from the state and is subject to state liquor licensing regulations. This Court reasoned: "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination." *Id.* at 176-77. Likewise, foster parents are not state actors simply because the state regulates them and provides them a license. The Fourth Circuit followed the same reasoning expressed by this Court in *Moose Lodge No. 107* when it held that the state did not coerce or encourage the abuse by the foster parents, and thus, the foster parents did not act on behalf of the state. *Milburn*, 871 F.2d at 479.

Applying this Court's precedent in the foster care context compels the conclusion that the Fourth Circuit properly held in *Milburn*, and in the instant case below, that foster parents are not state actors and foster care is not state custody.

C. Applying The Decisions Of Other United States Courts Of Appeals Does Not Compel A Different Conclusion In This Case.

Petitioners cite cases from other circuits as the basis for their contention that the Fourth Circuit erred in finding that the DSS defendants were entitled to qualified immunity. *Norfleet v. Arkansas Dep't of Human Serv.*, 989 F.2d 289 (8th Cir. 1993); *Yvonne L. v. New Mexico Dep't of Human Serv.*, 959 F.2d 883 (10th Cir. 1992); *K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir.), *cert. denied*, 498 U.S. 867 (1990); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989); and *Doe v. New York City Dep't of Social Serv.*, 709 F.2d 782 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983).

Contrary to petitioners' assertion, the Fourth Circuit did not ignore the existence of cases from other United States Courts of Appeals. The Fourth Circuit expressly recognized the existence of the cases from the other circuits, but then properly held:

> Whatever the clearly established law on this question, White's claim simply falls short on the facts. The summary judgment record contains no evidence to indicate that any of the DSS defendants knew or suspected that the Bonners were abusive foster parents when they placed Keena in their care. Indeed, the Bonners were licensed by the DSS, and

> White points to no evidence indicating that the Bonners had previously been accused of, or investigated for, child abuse. A claim of deliberate indifference, unlike one of negligence, implies at a minimum that defendants were plainly placed on notice of a danger and chose to ignore the danger notwithstanding the notice. There is simply no evidence that the DSS defendants were on notice of any problem at the time the placement decision was made.

Appendix at 10a. Additionally, although Ms. White alleged that she noticed bruises and scratches on her children during the December 9 supervised visit, the Fourth Circuit noted:

> Cassie Wilson, one of the caseworkers on the White case, testified that White had told her that the children routinely sustained minor injuries due to playing or fighting with one another Furthermore, Tina Werts, another caseworker, testified that she had taken Keena to the doctor with a cold on January 3, and that Keena had appeared to be in good condition on that date. DSS thus concluded that any alleged injuries were the "results of natural child play."

Appendix at 6a.

Although cases from other circuits have held that officials may be held liable for placing minor children in foster care where they suffered abuse, the Fourth Circuit noted that this case "simply falls short on the facts." Thus, even if the Fourth Circuit had followed those cases, its conclusion would have been the

same; and therefore, in that regard, its conclusion does not conflict with the decisions of other circuits.

The petitioners assert that the Bonners "had physically abused other foster children by hitting, slapping, locking in closets, and cursing them." Petition at 2. They also assert that the Bonners' adult son "had previously hit foster children in the head with his knuckles." *Id.* The petitioners again make similar allegations regarding abuse in the Bonner home on page 4 of their brief. However, the petitioners fail to inform the Court that they derive all of these allegations from an Investigative Matrix dated May 24, *1993* and a Determination Fact Sheet dated May 28, *1993* — more than a year *after* Keena's death. Thus, none of these factual allegations properly supports a claim that the DSS defendants knew or should have known that the Bonner home was unsafe either before placement or during placement.

Therefore, the Fourth Circuit properly concluded that the DSS defendants were entitled to qualified immunity for their conduct relating to Keena's placement in the Bonners' home.

II.

DID THE FOURTH CIRCUIT CORRECTLY CONCLUDE THAT THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT COULD NOT FORM THE BASIS OF PETITIONERS' 42 U.S.C. § 1983 CLAIM?

First and foremost, the petitioners' argument that the Adoption Assistance and Child Welfare Act ("AACWA"), 42 U.S.C. §§ 620-628, 670-679a, clearly established rights in the present case is not properly before this Court. Petitioners sought for the first time on appeal to the Fourth Circuit to claim the AACWA as the basis for their § 1983 claim. Prior to the appeal, petitioners alleged federal constitutional violations as the basis for their § 1983 claim. Both the headings of the amended

complaint and the statement of issues presented to the Fourth Circuit assert violations of federal constitutional rights, and not federal statutory rights. The only mention of the AACWA in the amended complaint appears on page 18 under the first cause of action for denial of *procedural* due process; yet the petitioners argued on appeal to the Fourth Circuit and currently argue that the AACWA clearly established substantive due process rights. In this sole mention of the AACWA, the amended complaint fails to even identify what provisions, if any, the DSS defendants allegedly violated. The amended complaint never mentions the AACWA under the causes of action for alleged denials of substantive due process rights. The Petition states for the first time ever in this case the specific provisions of the AACWA upon which the petitioners now seek to apply. Petition at 21. In their brief to the Fourth Circuit, petitioners merely referenced language from the AACWA, and from this language, the Fourth Circuit apparently gleaned that they intended to state a violation of § 671(a)(10).[5] Because the petitioners never identified to the Fourth Circuit any of the provisions which they now assert to this Court, the Fourth Circuit never had an opportunity to consider §§ 671(a)(7), 671(a)(16), or 672(c), and the Fourth Circuit was required to make assumptions regarding § 671(a)(10) as the basis for the claim. This Court should not allow the petitioners to wait until an appeal to assert a new ground as the basis for a § 1983 claim.

Even if provisions of the AACWA were properly before this Court, the Fourth Circuit correctly held that petitioners could not state a § 1983 claim arising out of alleged violations of the AACWA. In *Suter v. Artist M.*, 503 U.S. 347, 350 (1992), this Court was called upon to determine:

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5. At page 20 of petitioners' brief to the Fourth Circuit, they discuss requirements of the AACWA and cite to 42 U.S.C. § 608. The requirements discussed are those found in § 671(a)(10), not § 608; and thus, the Fourth Circuit must have concluded that petitioners intended to cite § 671(a)(10).

> whether private individuals have the right to enforce by suit a provision of the Adoption Assistance and Child Welfare Act of 1980 . . . , either under the Act itself or through an action under 42 U.S.C. § 1983.

This Court concluded that § 671 of the AACWA did not create enforceable rights under § 1983.

As noted by the Fourth Circuit below, this Court determined in *Suter* that § 671(a)(15) did not create privately enforceable rights because:

> (1) the section did not state a clear requirement of any conditions on state receipt of federal grants, *id.* at 356-57; (2) the statute did not include any "statutory guidance . . . as to how 'reasonable efforts' are to be measured," *id.* at 360; and (3) section 42 U.S.C. § 671(b) provided for the establishment of an alternative enforcement mechanism, *id.* at 360-61.

Appendix at 14a. The Fourth Circuit properly found that § 671(a)(10) is likewise not privately enforceable because (1) the provision is no more specific than § 671(a)(15); (2) the AACWA provides no statutory guidance to clarify the meaning of § 671(a)(10)'s requirements; and (3) the Secretary of Health and Human Services is vested with jurisdiction to redress violations of the AACWA. *Id.*

In addition to § 671(a)(10), petitioners assert, for the first time, §§ 671(a)(7), 671(a)(16), and 672(c) as the basis for their § 1983 claim. However, for the same reasons recited by this Court in *Suter*, and by the Fourth Circuit below, none of these

provisions of the AACWA is privately enforceable under § 1983. First, this Court noted in *Suter*, in reference to § 671(a)(9), that because "this subsection is merely another feature which the state plan must include to be approved by the Secretary, it does not afford a cause of action to the respondents anymore than does the 'reasonable efforts' clause of § 671(a)(15)." *Suter*, 503 U.S. at 359 n.10. The Court earlier noted that § 671(a) merely requires the state to "have a plan approved by the Secretary" which contains the listed features, and it does not create privately enforceable rights regarding the commitments contained in those plan. *Id.* at 358. For the same reasons this Court in *Suter* found that § 671(a)(15) did not create privately enforceable rights, §§ 671(a)(7) and 671(a)(16) likewise do not create privately enforceable rights. Thus, none of the subsections of § 671(a) is privately enforceable. Second, § 672(c) is not privately enforceable because it provides nothing more than the definition of a "foster family home," for purposes of the AACWA, and further, it leaves the states with discretion in determining the licensing requirements of a foster home. To conclude that § 672(c) is privately enforceable under § 1983 would render the federal courts the enforcers of each state's licensing requirements. As part of its reasoning in *Suter* that § 671(a) did not create a private right of action, this Court noted that "[h]ow the State was to comply with this directive, and with the other provisions of the Act, was, within broad limits, left up to the State." *Id.* at 360. Likewise, the licensing requirements for a "foster family home" are left up to the State.

Following *Suter*, Congress enacted 42 U.S.C § 1320a-2 which modified *Suter only* to the extent that *Suter* changed prior Supreme Court precedent. The enactment specifically stated that it was not intended to alter the holding in *Suter* that § 671(a)(15) of the AACWA is not privately enforceable. In *LaShawn v. Barry*, the D.C. Circuit held that § 1320a-2 did not modify *Suter* at all because *Suter* did not change pre-existing Supreme Court

precedent. 69 F.3d 556 (D.C. Cir. 1995), *vacated on procedural grounds*, 87 F.3d 1389 (D.C. Cir. 1996). Several other United States Courts of Appeals have cited *Suter* with approval after the date of § 1320a-2's enactment, October of 1994. *Tony L. v. Childers*, 71 F.3d 1182 (6th Cir. 1995) (*Suter* did not alter prior Supreme Court precedent), *cert. denied*, 116 S. Ct. 1834 (1996); *Freestone v. Cowan*, 68 F.3d 1141 (9th Cir. 1995) (*Suter* represents merely an elaboration and amplification of prior Supreme Court precedent, not a departure or a change), *vacated on other grounds sub nom. Blessing v. Freestone*, 117 S. Ct. 1353 (1997); *City of Chicago v. Lindley*, 66 F.3d 819 (7th Cir. 1995) (citing *Suter* together with prior Supreme Court precedent); *Little Rock Family Planning Serv. v. Dalton*, 60 F.3d 497 (8th Cir. 1995) (*Suter* did not overrule prior Supreme Court precedent), *cert. granted, in part & rev'd in part on other grounds*, 116 S. Ct. 1063 (1996). The Fourth Circuit correctly held that the congressional enactment did not alter *Suter* because "*Suter* itself was not a novel holding, but rather rested upon settled legal principles with regard to private rights of action in the context of the AACWA." Appendix at 14a. The petitioners maintain that § 1320a-2 requires this Court to "revert back to the analysis" set forth by this Court in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990) and *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987). However, petitioners fail to recognize that in *Suter* this Court followed both *Wilder* and *Wright* as well as *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981) and *Maine v. Thiboutot*, 448 U.S. 1 (1980). Therefore, *Suter* did not change pre-existing law; rather, it followed pre-existing law.[6]

Consequently, the Fourth Circuit correctly concluded that

6. Petitioners' statement that the decision below is in conflict with decisions of the Southern District of New York and Eastern District of Wisconsin is, of course, not grounds for a petition for a writ of certiorari. S. Ct. R. 10(a).

the AACWA does not create rights enforceable under § 1983 in the present case.

III.

DID THE FOURTH CIRCUIT CORRECTLY CONCLUDE THAT THE SOUTH CAROLINA CHILD PROTECTION ACT DOES NOT CREATE CONSTITUTIONAL GUARANTEES?

In the amended complaint, petitioners asserted violations of their procedural due process rights stemming from the DSS defendants' alleged failure to give notice and a hearing prior to the removal and their alleged failure to adequately investigate. In their brief to the Fourth Circuit, however, petitioners only addressed the alleged failure to conduct an adequate investigation. Brief of Appellees at 37-38. In their brief to this Court, petitioners allege that the South Carolina Child Protection Act ("Child Protection Act" or "Act") created a protected property interest in an adequate investigation and in protection by the state in accordance with the Act.

The Fourth Circuit did not fail to address petitioners' procedural due process claims as the petitioners state in heading III. Petition at 24. In fact, the Fourth Circuit specifically addressed these claims and concluded that the DSS defendants did not deny them procedural due process. Appendix at 9a. The Fourth Circuit held:

> White also contends that she and her children were denied procedural due process. We disagree. The Fourteenth Amendment interest that White possesses runs to court proceedings provided under state law and not to the discretionary discharge by DSS of its

> duties. *Weller*, 901 F.2d at 392. As to those court procedures, we have noted that "the requirements of process may be delayed where emergency action is necessary to avert imminent harm to a child." [*Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994)]; *Weller*, 901 F.2d at 393. In this case, DSS sought a judicially approved *ex parte* order before removing the White children. Furthermore, a full hearing was held within twenty-four hours of the removal. DSS therefore fully complied with this circuit's directive that such a hearing should be held soon after an emergency removal. *Jordan*, 15 F.3d at 351. In *Jordan*, we approved a hearing which was held some 65 hours after a child was removed from his home. Perforce, the much prompter hearing held in this case cannot be judged constitutionally invalid. Under these circumstances, we cannot conclude that White was denied the process she was due.

Appendix at 9a (footnote omitted).

In *Weller*, the Fourth Circuit correctly held:

> If Weller is seeking compliance with state law, this is not the proper forum. Even if BCDSS did violate state law, it is well settled that violations of state law cannot provide the basis of a due process claim. Weller has no property or liberty interest in the specific investigative procedures which he contends were neglected; therefore no due process claim can rest upon the state's failure to conduct them.

Weller, 901 F.2d at 392. In *Hodge v. Jones*, 31 F.3d 157, 169 (4th Cir.), *cert. denied*, 513 U.S. 1018 (1994), Associate Justice Powell, sitting by designation, recognized in his concurrence that " 'mere procedural guidelines' " set forth in a state statute "do not create a constitutionally protected liberty interest." This Court held in *Snowden v. Hughes*, 321 U.S. 1, 11 (1944), that "[m]ere violation of a state statute does not infringe the federal Constitution." Following *Snowden*, the Seventh Circuit held that "[a] state ought to follow its law, but to treat a violation of state law as a violation of the Constitution is to make the federal government the enforcer of state law." *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989).

> The Supreme Court, however, has repeatedly admonished both that the requirements of procedural due process are flexible, and that considerable deference must be accorded the delicate judgments made by responsible state officials. Perhaps in no context is this truer than where the state is acting as *parens patriae* to protect children from imminent danger. "This area has been left to the States from time immemorial, and not without good reason." In this area especially, while of course clear constitutional requirements cannot be ignored, "substantial weight must be given to the good-faith judgments of the individuals [administering a program] . . . that the procedures they have provided assure fair consideration of the . . . claims of individuals."

Jordan, 15 F.3d at 348-49 (quoting *Santosky v. Kramer*, 455 U.S. 745, 771 (1982)) (citations omitted).[7]

Petitioners claim of a property interest in an adequate investigation and protective services in accordance with the Child Protection Act does not state a valid procedural due process claim, but rather, attempts to assert a substantive due process claim of protection by the state. Procedural due process guarantees that a person will not be deprived of a liberty or a property interest without a hearing to vindicate that right. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Yet, petitioners do not demand a hearing or other process to vindicate the alleged deprivation of the claimed property interest in an adequate investigation and protective services, thereby proving the true nature of the asserted due process right.

In *Jensen v. Conrad*, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985), appellants argued that qualified immunity did not protect the DSS workers because the Child Protection Act clearly established an affirmative duty of protection. Following this Court's precedent, the Fourth Circuit held:

> The law in this instance that must be "clearly established" to avert the application of *Harlow* is a constitutional right to protection by the State. A state statute, by itself, cannot create a substantive constitutional right.

Id. at 195 n.12 (citing *Maine v. Thiboutot*, 448 U.S. 1 (1980)). Thus, the Constitution does not guarantee these petitioners the

7. The Fourth Circuit cited the following decisions of this Court: *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Schall v. Martin*, 467 U.S. 253 (1984); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Morrissey v. Brewer*, 408 U.S. 471 (1972); and *United States v. Yazell*, 382 U.S. 341 (1966).

investigation and protective services outlined in the Child Protection Act.

Petitioners rely upon *Jensen v. Anderson County Department of Social Services*, 403 S.E. 2d 615 (S.C. 1991), in which the administrator of a child's estate filed a wrongful death and survival suit against the Anderson County DSS and several of its employees. The child was beaten to death by his mother's boyfriend, and Jensen alleged that the defendants negligently caused the child's death by failing to investigate a report of child abuse as required by the Child Protection Act. *Id.* at 616-17. The South Carolina Supreme Court held that the Child Protection Act gives rise to a private cause of action and that it imposes a duty on the local agency to investigate and intervene in cases of reported child abuse. *Id.* at 619. Contrary to petitioners' assertion, *Jensen* in no way establishes a procedural due process right to an investigation and appropriate intervention; rather, *Jensen* allows a state claim for violations of the Child Protection Act. *Jensen* recognized a duty to intervene and protect victims of suspected child abuse under state law, and not under the Constitution. To read *Jensen* any differently would render the decision in conflict with this Court's decision in *DeShaney*, which held that the state bears no constitutional duty to protect children from harm inflicted by private actors.

Contrary to petitioners' assertion, this Court in *DeShaney* did not recognize that the protective services set forth in the Wisconsin child protection statutes provided an entitlement which would enjoy due process protection under this Court's decision in *Roth*. *DeShaney*, 489 U.S. at 195 n.2. Instead, this Court was merely reciting the petitioners' position that the protective services set forth in the statute created entitlements under *Roth*, and this Court refused to decide the issue because it was not properly before the Court.

Petitioners later in their brief claim that the Child Protection Act created an entitlement to adequate staffing, delivery of services to victims of suspected child abuse, and general compliance with policies, procedures, and regulations promulgated pursuant to the Act. Petition at 26. "The adoption of such procedural guidelines, without more, suggests that it is these restrictions alone, and not those federal courts might also impose under the Fourteenth Amendment, that the State chose to require." *Hewitt v. Helms*, 459 U.S. 460, 471 (1983). Petitioners quite obviously ask this Court to paint with too broad a brush in defining the existence of constitutional entitlements under state statutory law.

IV.

THE FOURTH CIRCUIT'S DECISION IS BOTH CORRECT AND CONSISTENT WITH ALL CIRCUIT COURTS' ANALYSIS, AND NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE LIST OF QUESTIONS PRESENTED IN THE PETITION.

In what might have been alleged as a negligence case in state court, the custodial parent at the time of the initial child abuse seeks to bring a violation of constitutional rights case in federal court. The case before the Fourth Circuit alleged a multitude of constitutional rights violations in a number of causes of action making claims under the Fourth, Fifth, Eighth[8] and Fourteenth Amendments as well as the South Carolina Tort Claims Act. In the Statement of the Case before this Court, the petitioners still ask that no less than five (5) issues be reviewed and considered to be constitutional rights violations.

8. There is no Eighth Amendment issue presented in this case, despite the petitioners' repeated references to it. Petition at 12, 15, 29. Neither Keena White nor any other White children were ever incarcerated. The Fourth Circuit correctly ignored the Petitioners' attempts to interject this as a basis for constitutional relief on the facts of this case.

These five constitutional due process rights are alleged to be found: (1) in the removal of Keena White from the abusive home of the custodial parent; (2) in the placement of White in the licensed foster home of the Bonners; (3) in the monitoring during the time with the Bonners; (4) in substantive due process rights allegedly created by the South Carolina Child Protection Act; and (5) in substantive due process rights allegedly created by the federal Adoption Assistance and Child Welfare Act.

The Fourth Circuit's opinion carefully analyzed each of these claims. With respect to the due process rights surrounding removal of the children from the abusive home of the petitioner, the court recognized that the South Carolina Code limits the state's authority to assume custody, and the state court afforded proper procedural due process in the notice and hearing. With respect to placement and monitoring in the Bonner foster home, allegations of negligence do not implicate federal constitutional rights. The Fourth Circuit recognized the decisions of other circuits on other facts which crossed the line from negligence to deliberate indifference and found that the petitioners' case "simply fall short on the facts." In dealing with the final two issues, the Fourth Circuit concluded that neither the South Carolina Child Protection Act nor the Adoption Assistance and Child Welfare Act creates new substantive due process rights.

The Fourth Circuit correctly found that within the Fourth Circuit, there is no clearly established right, but the Court went much further. The central thrust of the Fourth Circuit's opinion is the conclusion that on the factual record, there could at best be an attempt to seek compliance with state law or bring a negligence claim, neither of which is properly brought in the federal courts as a constitutional rights case. It is a case for summary judgment on the facts. Under any circuit's standard, there would be no liability here.

The Fourth Circuit is correct that the factual record in this case does not raise a federal constitutional question whatever the clearly established law may be. In this case, on these facts, the Fourth Circuit is not in conflict with any other circuit.

This record does not raise the constitutional issues the petitioners want this Court to review. Rather, it is a factual debate about the correctness of a summary judgment decision on qualified immunity.

CONCLUSION

For the forgoing reasons, the respondents respectfully pray for this Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. First, the Fourth Circuit correctly concluded that no clearly established right to affirmative state protection exists for children in foster care because foster parents are not state actors. Second, the decisions of the other United States Courts of Appeals cited by petitioners would not affect the Fourth Circuit's result in this case, as stated by the court below. Third, the Fourth Circuit correctly applied this Court's precedent in concluding that the AACWA could not form the basis of petitioners' § 1983 claim. Finally, in accord with this Court's prior decisions, the Fourth Circuit correctly decided petitioners' procedural due process claims and correctly held that the Child Protection Act does not create constitutional guarantees.

Respectfully submitted,

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